No. 193

In the Supreme Court of the United States

OCTOBER TERM, 1939

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v.

WATERMAN STEAMSHIP CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

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The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered on April 11, 1939 (R. 541–542), granting the petition of the Waterman Steamship Corporation that the order of the Board issued against it be set aside, except as modified and approved by the court with respect to C. J. O'Connor.

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 103–119) are reported in 7 N. L. R. B. 237. The opinion

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of the Circuit Court of Appeals (R. 537–541) is reported in 103 F. (2d) 157.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 11, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the Board's findings that respondent discharged and refused to reinstate certain employees because they were members of a particular labor organization or had engaged in concerted activities for the purpose of collective bargaining.

2. Whether there was substantial evidence to support the Board's findings that respondent discriminated between two rival labor organizations in the issuance of passes permitting their representatives to board its ships, thus interfering with the employees' freedom of choice of bargaining representatives.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Supp. IV, Title 29, Sec. 151 *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *

* * * * *

SEC. 10.

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(f) * * * the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

STATEMENT

Pursuant to charges and amended charges filed by the National Maritime Union of America, a labor organization hereinafter referred to as the N. M. U., the National Labor Relations Board, on October 9, 1937, issued its complaint and notice of hearing, which were duly served upon respondent (R. 26–29). The complaint, as thereafter amended, alleged, in substance, that respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (3) of the Act (R. 29–32). Respondent duly filed its answer (R 34–43), and a hearing was held from November 1 to November 5, 1937, before a Trial Examiner of the Board (R. 120–530). On January 17, 1938, the Trial Examiner filed an Intermediate Report (R. 45–79) containing his findings and recommendations, to which exceptions were filed by respondent (R. 80–98) and by the International Seamen's Union of America (R. 99–102) (hereinafter referred to as the I. S. U.), a labor organization which had been permitted to intervene in the proceeding (R. 126). On March 8, 1938, respondent, the I. S. U., and the N. M. U. appeared before the Board by counsel and were heard in oral argument (R. 102). On May 18, 1938, the Board issued its findings of fact, conclusions of law,

and order (R. 103–119). The Board's findings may be briefly summarized as follows:[1]

Respondent is engaged in the operation of steamships in interstate and foreign commerce (R. 106). In July 1937 the crews of two of respondent's vessels changed their affiliation from the I. S. U. to the N. M. U. (R. 107–108). Respondent promptly discharged the entire crews because of their membership in the N. M. U., thus violating Section 8 (3) and (1) of the Act (R. 108–114, 117). Respondent likewise violated those sections of the Act by discharging Edmund J. Pelletier because of his membership in the N. M. U. and C. J. O'Connor by reason of his activities in behalf of a labor organization (R. 113–116). The Board further found that respondent violated Section 8 (1) of the Act by discriminating between the I. S. U. and the N. M. U. in the issuance of passes permitting union representatives to board respondent's vessels and that this discrimination interfered with the employees' free choice of collective bargaining representatives, in violation of Section 8 (1) of the Act (R. 106–107, 117).

Accordingly, the Board ordered respondent to cease and desist from the unfair labor practices found, and as affirmative action necessary to effectuate the policies of the Act, required respondent to reinstate the discharged employees with back

[1] The evidence supporting these findings is discussed at pp. 8–17, *infra*.

pay, including the reasonable value of maintenance they would have received had they not been discharged; to grant passes to repreesntatives of the N. M. U. in equal numbers and under the same conditions as to representatives of the I. S. U. or its successor; and to post appropriate notices (R. 116–118).

On June 16, 1938, respondent, pursuant to Section 10 (f) of the Act, filed with the Circuit Court of Appeals for the Fifth Circuit a petition to set aside the foregoing order (R. 1–21). The Board answered, requesting full enforcement of its order (R. 530–536). On April 11, 1939, the court set aside the Board's order except for the provision requiring the reinstatement of C. J. O'Connor, which was modified and enforced (R. 541–542). The court was of the opinion that none of the Board's findings of fact with reference to illegal discrimination was supported by substantial evidence (R. 539–541).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In not holding that the following findings of the Board were supported by substantial evidence and were therefore conclusive under Section 10 (e) and (f) of the Act:

(a) That respondent discharged and refused to reinstate the entire crews of two ships and two other employees, Edmund J. Pelletier and C. J. O'Connor, because of their union affiliation or activ-

ity, in violation of Section 8 (3) and (1) of the Act;

(b) That respondent discriminated between two rival labor organizations in the issuance of passes permitting their representatives to board its ships and thus interfered with the employees' freedom of choice of collective bargaining representatives, in violation of Section 8 (1) of the Act.

2. In setting aside and denying enforcement to the Board's order, except as modified in respect to C. J. O'Connor.

REASONS FOR GRANTING THE WRIT

A. In our opinion the record in the present case contains clear and overwhelming proof of one of the most flagrant instances of mass discrimination against employees in violation of Section 8 (3) of the Act that has yet been encountered under the National Labor Relations Act. Yet the court below, without discussing the evidence in detail, denied enforcement to the Board's order with the observation that "The evidence does not even point in [the] direction" of an illegal motive for the discharges, and that the Board's findings were "based on suspicion and not on the evidence" (R. 539). We submit that the court was clearly in error, and that the Board's findings were supported by the overwhelming weight of the proof. In setting them aside, the court unwarrantably interfered with the Board's functions under the Act. We shall briefly review the evidence on two aspects of the case:

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the illegal discharge of two entire crews for joining the labor organization of their choice, and respondent's discriminatory issuance of passes to board its ships. On each issue, the evidence which supports the Board's findings is "substantial" within the strictest meaning of the term.[2]

1. On or about July 1, 1937, while two of the respondent's vessels, the *Bienville* and the *Fairland,* were in port at Tampa, Florida, the members of both crews withdrew from the I. S. U. and joined the N. M. U. (R. 132–135, 156–157, 211, 224–225). Respondent learned of this change before the ships left Tampa (R. 294, 340).[3]

By a memorandum dated July 1 respondent ordered the *Bienville* back to its home port of Mobile 5 days ahead of schedule, cancelling stops at several intermediate ports for which the ship carried

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[2] We do not discuss the evidence supporting the Board's findings (R. 113-116) that Edmund J. Pelletier and C. J. O'Connor were discharged and refused reinstatement by reason of their union membership or activities. In each case, we submit, the Board's findings are supported by substantial evidence and we have assigned as error the court's denial of enforcement to the pertinent portions of the Board's order (*supra*, pp. 6–7). In the case of O'Connor, although the order was modified and enforced with reference to his reinstatement, the court denied enforcement to the cease and desist provisions and expressly disapproved the Board's finding of illegal discrimination (R. 541–542). This result is inexplicable under the Act (Section 10 (c)).

[3] The crew of the *Bienville* had voted unanimously at a meeting aboard the ship while in Le Havre, France, several days before July 1, to change from the I. S. U. to the N. M. U. (R. 156, 192, 211).

cargo (R. 371–372, 474–475; Bd. Exh. 25).[3a] On the morning after the ship's arrival, respondent's vice president asked one of the crew why the men had changed to the N. M. U. (R. 157–158). On the same day the entire crew was discharged, and the ship was laid up for about 27 days undergoing repairs (R. 161, 201, 323).

Upon the *Fairland's* arrival at Mobile its captain informed the crew that they were no longer needed because they had joined the N. M. U., and respondent's port captain informed a member of the crew that if the men rejoined the I. S. U. they could keep their jobs (R. 225–226). The crew was discharged (R. *ibid.*, 335). After routine inspection (R. 472–473), which was completed in 30 hours, the *Fairland* was kept idle for about 7 days (R. 331, 387). When the *Bienville* and the *Fairland* finally sailed again, both ships were manned with crews belonging to the I. S. U. (R. 293). Respondent had never before discharged all the members of a crew of a ship (R. 353–354, 320–321).

The Board's finding that the mass discharges were caused by the crews' shift to the N. M. U. (R. 114) finds additional support in the evidence of respondent's patent discrimination against the members of the two crews in the allotment of repair work on the *Bienville*. Customarily, respondent employed members of the crew of a laid-up ship in repair work (R. 162, 401–403, 199–200, 202, 227,

[3a] References to exhibits are to the originals thereof on file in the office of the Clerk.

239–241, 246–250). While the *Bienville* was laid up, however, respondent did not use any members of the crews of the *Bienville* and the *Fairland* until the Board's Regional Director requested that they be reinstated pending an election which had been directed by the Board (R. 354–356, 369–370; Resp. Exh. 19).[4] More than 100 men were then already working on the repairs (R. 324, 356; Resp. Exh. 20). Some of the crew members were then taken on (R. 159, 360). One of them was urged by respondent's assistant port engineer to rejoin the I. S. U. and he, together with another, was discharged after warnings to remove their N. M. U. buttons (R. 159–160, 226–227). Shortly thereafter all the remaining crew members were discharged although work remained to be done (R. 159–162, 202–203, 227). Respondent did not even try to explain these eliminations at the hearing.

Respondent attempted to explain the mass discharges of the two crews on the ground that they were occasioned by repairs planned long prior to the change in the crew's affiliation. The court below accepted this explanation as based on "evidence * * * virtually without dispute" (R. 539), and rejected the Board's finding that the lay-ups were but a pretext for the elimination of the N. M. U. crews (R. 110). We think that the defense was dis-

[4] The preferential hiring contract between respondent and the I. S. U., discussed *infra*, pp. 13–14, had no application to this work. It did not in terms apply to the shop work and it is conceded that it did not apply to any jobs other than those as members of the crew (R. 288, 368).

proved by the very witnesses who had previously testified to it.

The *Fairland* was in the water again within 30 hours after its crew had been discharged, but was kept idle for 7 days (R. 331). Respondent's executive vice president testified that no "repairs to speak of" had been made during this period and that the true explanation was a holiday business slack and necessary adjustment of the sailing schedules (R. 387, 367–368). The captain of the *Fairland* gave the same explanation (R. 344). Respondent's assistant port engineer, on the other hand, testified that the ship had undergone extensive repairs (R. 390–392); and the port captain could not recall whether or not its schedule had been adjusted (R. 490–491). The lack of a consistent explanation for the *Fairland's* idleness during this 7-day period, together with the highly suspicious circumstances under which it began (*supra*, p. 9), supported the Board's finding that the lay-up was arranged for the purpose of facilitating discharge of the crew because they joined the N. M. U.

It is equally difficult to understand, in the case of the *Bienville*, the court's reference to "evidence * * * virtually without dispute" (R. 539). Respondent's witnesses gave confused and contradictory accounts of when the repairs were planned. Respondent's vice president testified that steel had been ordered several months previously for the repair of the *Bienville* and that the repairs were planned long prior to the ship's arrival at

Mobile on July 5 (R. 287, 370–371.) However, when confronted with documentary evidence proving that the lay-up had not been contemplated at a time 2 weeks prior to July 5,[5] he retracted his testimony and stated that the steel might have been ordered for a sister ship, the *Azalea City* (R. 371–372). A similar contradiction of his earlier testimony that plans had been made for repairs on the *Bienville* was made by respondent's assistant port engineer (R. 394, 411–412). Further, the executive vice president testified that the schedule in effect on July 1 called for the *Bienville* to arrive at Mobile on July 11 and remain only until July 15, which, of course, allowed insufficient time in port for the repairs which respondent claimed were planned prior to July 1 (R. 371–372).[6] Further, it was never explained why, if a preexisting repair plan were the reason for the discharge of the crews,

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[5] This document, a stipulation entered into by counsel for respondent on June 21, 1937, in an election proceeding before the Board, recited that the *Bienville* would be in various other ports until July 9, and in Mobile only from July 11 to 15 (R. 371). The lay-up in question was from July 5 to the early part of August.

[6] This is the only possible inference from the testimony of respondent's vice president that the *Bienville* arrived at Tampa in accordance with the stipulated schedule and was, at the time of its recall to Mobile, scheduled to reach Mobile July 11 (R. 371–372)—a plan consistent only with respondent's stipulated schedule calling for only a 4-day lay-up at Mobile (*supra*, note 5). This schedule was fully discussed in the testimony of respondent's officers, its authenticity was never denied, and no evidence whatever was adduced to show a subsequent plan for a longer lay-up.

the *Bienville* had been hurriedly called to Mobile on July 5, immediately after the change of union affiliation, even though that recall necessitated the cancellation of stops at several ports for which she carried cargo (R. 371, 475).

The weakness of respondent's explanation, however, does not rest alone on its glaring inconsistencies. Even assuming, contrary to the fact found by the Board, that the lay-ups were *bona fide*, nevertheless there is still no explanation for the evidence of clear discrimination against the N. M. U. men in the allotment of repair work on the *Bienville* (*supra*, pp. 9–10).[7] Nor does the explanation account for the mass discharge of the N. M. U. crews. The evidence is conclusive that lay-ups do not, either under respondent's practice or that of the industry as a whole, occasion mass discharges of the crews. The men are reshipped, even after lay-ups as long as 60 days (R. 246–252, 257–258, 166–167, 193, 197–201, 239–241, 320–321, 353–354). The observation of the court below that the discharges were, in its opinion, for reasons of economy, is simply incomprehensible. There is no support whatever for it in the evidence, nor could

[7] The court below did not refer to the circumstances or duration of the crew's shore work, nor to the clear discrimination against them in such work because they would not leave the N. M. U. The only reference by the court below to this evidence was its statement that "some of the members of the crews were employed in the shops while the ships were laid up" in support of its statement that respondent did not "make war on the unions" (R. 539).

there be, since an employee who is laid off pending reshipment is obviously no more entitled to wages or expenses during the time he is not working than an employee who has been validly discharged.

The preferential hiring contract with the I. S. U. which was also relied upon by the court below (R. 539–540), has no application whatever. The contract in terms provides that it shall not require the discharge of any employee for failing to join the I. S. U.,[8] and "vacancies," within the meaning of its provisions could not be created by the illegal discharge of employees for joining the N. M. U. The contract would apply, in other words, only if the discharge of the crews which preceded the re-manning of the ships were valid discharges, and the issue of their validity still remains as the primary issue. There is no warrant whatever for the charge made by the court below that the Board's order would "penalize the company for keeping this contract" (R. 539–540).

In summary, then, in the only two instances where crews of respondent's ships joined the N. M. U. (R. 302) those crews were promptly discharged

[8] The pertinent provision of the contract is as follows (Resp. Exh. 14, Art. II, Sec. 1); "It is understood and agreed that, as vacancies occur, members of the International Seamen's Union of America, who are citizens of the United States, shall be given preference of employment, if they can satisfactorily qualify to fill the respective positions; provided, however, that this Section shall not be construed to require the discharge of any employee who may not desire to join the Union, or to apply to prompt reshipment, or absence due to illness or accident."

en masse, an unprecedented step in respondent's operations. In announcing the discharges, respondent's officials made emphatic references to the men's change of union affiliation. The lay-ups, advanced as an explanation, came as a surprise to the captain of the *Fairland* (R. 343), involved the precipitate recall of the *Bienville* without touching at scheduled ports and were the subject of contradictory and entirely confused explanations by responsible officials of the company. During the lay-ups some of the N. M. U. members were even denied the customary shore work, for the express reason that they wore their union buttons, and others were discharged without explanation. We submit that these facts constitute substantial evidence, and that the Board's finding of discriminatory discharge should have been sustained.

2. The contract between the I. S. U. and respondent provided that the latter would allow I. S. U. delegates to board its ships, subject to regulations prescribed by respondent (Resp. Exh. 14, Art. II, Sec. 3). The contract does not, however, prevent respondent from granting like privileges to other labor organizations (*ibid.*). Yet respondent, while allowing I. S. U. delegates aboard (R. 339), consistently refused to admit N. M. U. representatives for any purpose (R. 137, 139; answer to amended complaint, paragraph 8, R. 38). The Board found this action to be a violation of Section 8 (1) of the Act (R. 107, 117).

The court below, on the contrary, accepted (R. 540) as a complete defense to this plain discrimination between the I. S. U. and the N. M. U. a bulletin (R. 298) which respondent sent to the masters of its ships and to the I. S. U., stating that neither union would be permitted to solicit members aboard the vessels. The court wholly ignored the fact, testified to by respondent's own witnesses, that the I. S. U. delegates, whom respondent continued to admit for the ostensible purpose of collecting union dues, were permitted to contact the men without supervision and without any attempt by respondent to curb solicitation (R. 339, 373). The court's view is equivalent to a holding that a blanket instruction by the head of a company to its officials and supervisors that they should not violate the Act is a complete defense to a subsequent complaint alleging discrimination, regardless of how clear the proof may be that discrimination in fact occurred.

The court below also advanced, as a further defense to the charge of discrimination in the issuance of passes, the suggestion that "One may conclude from the evidence that if the union representatives were permitted to go aboard the ships to organize and recruit members, business and shipping in all probability would be shunted aside while the rival unions staged a battle for supremacy" (R. 540). There is not an iota of evidence to support the court's assumption that solicitation by both unions would have in any way threatened

any kind of injury to respondent's business.[9] But, in any event, the supposition is beside the point. Equal treatment of both unions did not require respondent to permit solicitation by both. Respondent had simply effectively to bar solicitation by both unions, which, in fact, it purported to do, and all illegal discrimination would have been avoided.

B. On the evidence detailed above, the Board's findings were clearly entitled to finality under Sec-

[9] It is this factor, among others, which distinguishes the present case from *Peninsular & Occidental S. S. Co.* v. *National Labor Relations Board*, 98 F. (2d) 411 (C. C. A. 5th), certiorari denied, 305 U. S. 652. In the *Peninsular* case the change of affiliation from the I. S. U. to the N. M. U. was not unanimous among the crews but resulted in the creation of majority and minority factions. According to the court's opinion, this split gave rise to sit-down strikes, threats of sabotage, and the possibility of mutiny. The court therefore concluded that the crews could not be considered "competent as a unit" and their discharge was regarded as a justified safety measure (98 F. (2d), at 415). In the present case the entire crews changed their affiliation; there were no strikes of any kind, no threats of sabotage, no defiance of officers. Respondent did not at any stage of the proceeding challenge the competency of the crews in any respect, nor did the court below hold the discharges valid on this ground. The two cases likewise differ in that in the *Peninsular* case the various acts of coercion by the ship's officers were discounted by the court for the dual reason that they were not authorized by the company's responsible shore officials and that the officers were merely propagandizing in favor of their own unions. It was therefore held that there was not sufficient evidence of hostility by the company toward the N. M. U. to warrant the Board's findings. In the present case, the coercive statements and the statement that the men could retain their jobs if they rejoined the I. S. U. were made by high officials of respondent, and it is not claimed that these officials belong to any union.

tion 10 (e) and (f) of the Act. The court's terse denial of that finality is an unwarranted interference with the proper functioning of the Act and has resulted in flagrant violations of the Act standing uncorrected.

The present petition does not, however, rest solely upon the result of the decision below, even though the error, we believe, is gross and the injustice is manifest. The petition is also grounded upon the apparently consistent failure of the court below in the present decision and in its other decisions rendered during the past two years to give effect to the provision of the Act that the findings of the Board as to the facts, if supported by evidence, shall be conclusive. *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 98 F. (2d) 406, rehearing denied, 98 F. (2d) 870; *Peninsular & Occidental S. S. Co.* v. *National Labor Relations Board*, 98 F. (2d) 411, certiorari denied, 305 U. S. 652; *Globe Cotton Mills* v. *National Labor Relations Board*, 103 F. (2d) 91. That apparently persistent failure presents a question of public importance in the equal administration and enforcement of the law according to its valid terms. We believe that violations of the Act have been wholly or largely unremedied, including, in one instance, acts which the court itself held to be unlawful.[10] For these

[10] In *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 98 F. (2d) 405, the court first sustained the Board's findings that an employee had been unlawfully discharged, but remanded the case to the Board for clarification of the

reasons we respectfully submit that this petition for a writ of certiorari should be granted.

GOLDEN W. BELL,
Acting Solicitor General.

CHARLES FAHY,
General Counsel,
National Labor Relations Board.

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reinstatement provisions of its order, 91 F. (2d) 509. The Board amended its order, and the court then directed that it be made "the order and decree of this Court." Thereafter, the court dismissed a rule for contempt on the ground that its own decree was "ambiguous" and "impossible of performance," 98 F. (2d) 405. In its petition for rehearing, the Board urged that the court, if it still believed the decree to be ambiguous, should exercise its undoubted power to modify it in order to prevent a failure of justice. The petition for rehearing was denied, 99 F. (2d) 56, and the illegal acts remain unremedied.

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